

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

CHARLES SCHWAB & CO., INC.

And

Case No. 27-CA-184730

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BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT'S POST-HEARING BRIEF

Charles Schwab & Co., Inc. (“Schwab,” the “Company,” or “Respondent”), by its attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., and pursuant to Section 101.10 of the Rules and Regulations of the National Labor Relations Board (the “Board”), hereby files this Post-Hearing Brief as follows:

I. INTRODUCTION AND OVERVIEW

The circumstances surrounding the Company’s policy at issue in this case are unique. Schwab is not a typical employer. The Company operates in highly regulated industries that place arduous requirements on it to implement safeguards, in the form of policies and procedures, to protect the public from misrepresentations and misleading conduct by its employees. Indeed, Schwab provides banking and investment services to individual and corporate clients throughout the country. Consequently, Schwab is heavily regulated because it is entrusted with clients’ savings, investments, and financial security.

General Counsel contends two provisions of Schwab’s Business Conduct Policy violate the National Labor Relations Act (“NLRA” or the “Act”) because they are facially overbroad and employees could reasonably construe them to restrict employees’ exercise of their protected rights under Section 7 of the Act. Specifically, General Counsel contends the following two prohibitions, contained in Schwab’s definition of misconduct, violate the Act:

- Acts of disrespect or unprofessional or rude conduct, including making disparaging comments to or about co-workers or clients; and
- Acts of misrepresentation, or other misleading conduct.¹

Schwab denies these contentions and asserts neither provision, when read and applied in the proper context, could *reasonably* be construed to chill protected activity.

¹ The referenced provision in its entirety reads as follows, “Acts of dishonesty, misrepresentation, or other misleading conduct.”

The first provision is not facially invalid. Schwab is permitted to expect its employees to work together in an atmosphere of civility, while also treating Schwab's clients with respect. There is nothing in the policy limiting employees' protected activity and, more specifically, nothing in the policy specifically prohibiting employees' conduct as it relates to the Company or to employees' supervisors.

The second provision is a necessary element of Schwab's obligation to comply with a variety of statutory and regulatory requirements. Numerous regulations governing both the banking and securities industries require that employees not engage in dishonesty, misrepresentations, or misleading conduct of any kind. If employees engage in acts of dishonesty, misrepresentation, or misleading conduct, it is the expectation and requirement of the government's regulating agencies that Schwab hold those employees accountable. Failure to do so subjects the Company to a variety of consequences, including possible revocation of the Company's ability to engage in banking and investment services. Schwab employees know and understand the regulated nature of the industries in which they work. Neither provision, when read in context, would cause Schwab employees to reasonably construe restrictions on Section 7 activities.

During the May 9, 2017 hearing, Schwab presented two witnesses, Jill Richards, Chief Compliance Officer, and Michael Marsh, Vice President of Compliance, who testified regarding Schwab's compliance obligations related to both its banking affiliate and its securities broker/dealer affiliate. Specifically, the witnesses described many regulations and laws requiring Schwab to prohibit its employees from engaging in dishonesty, misrepresentations, and misleading conduct.

General Counsel did not present any evidence at the hearing, other than the existence of the policy, and the Company's evidence was unrebutted.

II. STATEMENT OF FACTS

A. The Company.

Schwab is a financial services firm engaged in providing securities brokerage and related financial services with locations throughout the United States, including multiple locations in Colorado. (Transcript at 12:20-13:2.)² The Company operates in a "highly-regulated industry." (*Id.* at 13:12-13.) Strict regulation is necessary, in part, because the deposits the bank receives are federally insured by the Federal Deposit Insurance Corporation ("FDIC"). (*Id.* at 13:13-18.) Indeed, the federal government has a "stake in how the bank functions [and] operates." (*Id.* at 13:16-18.)

B. Schwab Operates in Highly Regulated Industries.

Against the backdrop of the government having a stake in the Company as a banking and securities entity, several agencies within federal and state governments impose requirements upon Schwab related to the honesty of Schwab's employees. (*Id.* at 14:3-11, 57:8-18.) While some of these regulations apply equally to both Schwab's banking affiliate and Schwab's securities affiliate, they will be discussed separately for purposes of this Statement of Facts.

1. Regulation of Schwab's Banking Affiliate.

Banking is highly regulated, with the government greatly concerned about the safety and soundness of the bank's operations. (*Id.* at 13:12-25.) For example, the Federal Deposit Insurance Act prohibits Schwab from hiring an employee who "has been convicted of a crime of

² Citations to the hearing transcripts are referenced as "Tr." with the appropriate page and line number(s). Citations to the General Counsel's Exhibits and Respondent's Exhibits will be denoted by "GC" and "R." respectively.

dishonesty.” (*Id.* at 14:4-11.) Further, Schwab is required to terminate any current employee who is convicted of a crime implicating dishonesty during his or her employment. (*Id.*)

Schwab is also regulated by the Consumer Financial Protection Bureau (“CFPB”) which was created following the 2008 financial crisis and is responsible for consumer protection rules that apply to financial services. (*Id.* at 15:11-15.) The CFPB enforces the Truth in Lending Act which requires Schwab to assess each potential mortgage loan originator’s character. (*Id.* at 15:16-16:15; R. Ex. 1.) As part of this character assessment, Schwab must “consider any acts of personal dishonesty.” (Tr. at 16:21-24.) To make this determination, Schwab analyzes, for example, whether the applicant or current employee lied on his or her employment application or whether he or she was dishonest about anything else related to his or her employment. (*Id.* at 17:2-8.)

The Office of the Comptroller of the Currency (“OCC”) also regulates Schwab, requiring the Company’s Board of Directors to maintain and enforce a code of conduct that includes policies prohibiting misrepresentations and requiring employees to deal honestly. (*Id.* at 17:11-19.) Further, Schwab is regularly audited by both the OCC and the CFPB—it is a crime to make a misrepresentation to one of these agencies during an audit. (*Id.* at 17:20-18:5.) Indeed, the OCC has resident auditors who work full-time out of Schwab’s San Francisco offices, conducting several audits each year. (*Id.* at 18:13-18.) Part of these audits includes ongoing investigation into whether Schwab considered its requisite assessment of its mortgage loan originators’ character, including assessment of the employees’ character for honesty. (*Id.* at 19:16-23.)

The Company interacts with approximately one hundred different auditors each year. (*Id.* at 22:4-10.) If one of these agencies determines an employee has been dishonest or engaged in

misleading conduct, in addition to potential consequences to Schwab, the agency has the authority to ban the individual from working for another bank. (*Id.* at 22:17-24, 23:3-9.) If an audit uncovers allegations of dishonesty, misrepresentation, or misleading conduct, the agency sends a formal notice to Schwab requiring the Company to take “action to remediate the issue.” (*Id.* at 26:4-15.) After the formal notice, the agency could take one of several enforcement actions, including a public enforcement action, a cease and desist order requiring specific actions, or even revoke the Company’s right to operate as a bank. (*Id.* at 26:16-27:5.)

When conducting their audits and in requiring Schwab to implement and enforce a code of conduct, these agencies do not differentiate between dishonesty, misleading conduct, and misrepresentations. (*Id.* at 28:12-24.) Issues of dishonesty, misrepresentation, and misleading conduct are not limited to work-related matters. For example, in accordance with law, Schwab had to assess whether a conviction for giving false identification to a police officer when an applicant was 19 years old would be a bar from employment. (*Id.* at 29:9-16.) This incident implicated personal dishonesty, was not related to the individual’s potential work with Schwab, and was not malicious. (*Id.*) Yet, the conduct fell within the character assessment and prohibition against hiring or retaining individuals convicted of crimes of dishonesty. (*Id.*)

2. Regulation of Schwab’s Securities Affiliate.

Like Schwab’s banking affiliate, the Company’s securities affiliate operates in a heavily regulated industry. (*Id.* at 80:7-11.) The securities affiliate is regulated by several agencies, including the Securities and Exchange Commission (“SEC”) and state agencies. (*Id.* at 57:10-18.) Further, Schwab’s securities affiliate is regulated by a self-regulatory organization, the Financial Industry Regulatory Authority (“FINRA”). (*Id.*) FINRA “takes the integrity of [Schwab] very seriously.” (*Id.* at 67:19-20.) FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade) requires members to “observe high standards of commercial

honor and just and equitable principles of trade.” R. Ex. 8. FINRA applies its Rule 2010 broadly to require a high ethical standard and prohibits dishonesty, misrepresentations, and misleading conduct. (*Id.* at 58:22-59:7, 59:25-60:7.) Accordingly, FINRA disciplines individuals based on its Rule 2010—even for misrepresentations outside of the scope of the individual’s employment. (*Id.* at 61:15-25.) For example, FINRA has pursued enforcement against individuals in the securities industry for cheating a casino or misappropriating political campaign funds. (*Id.* at 62:3-14.) FINRA’s enforcement actions under Rule 2010 are not limited to criminal behavior. (*Id.* at 62:23-24.) Importantly, FINRA regulates all of Schwab’s employees, not just individuals who are registered under its requirements. (*Id.* at 91:24-92:1.)

FINRA also requires Schwab to utilize Form U-4 which is a form originally created by the SEC. (*Id.* at 63:19-64:1.) Form U-4 is an application for registration in the securities industry that Schwab employees must fill out. (*Id.*) The form requires the applicant to disclose instances of dishonesty requiring, for instance, an applicant to state whether the SEC has “ever found [the applicant] to have made a false statement or omission.” (*Id.* at 65:20-25; R. Ex. 9, Form U-4, Question 14-C.) The form also requires applicants to respond to the inquiry, “Has any other federal regulatory agency or any state regulatory agency . . . ever found you to have made a false statement or omission or been dishonest, unfair, or unethical?” (*Id.*; R. Ex. 9, Form U-4, Question 14-D.) In addition, the form requires applicants to disclose whether any self-regulatory organization ever found him or her to have made a false estimate or omission. (*Id.* at 66:4-5; R. Ex. 9, Form U-4, Question 14-E.) An individual must accurately fill out this form to work in the securities industry. (Tr. at 66:7-15.) The obligation to report is not static; it is ongoing and requires the form be updated throughout the course of an individual’s employment. (*Id.* at 66:16-21.) FINRA investigates all disclosures of dishonesty and misrepresentations, and

depending on the circumstances, such a disclosure could result in the individual being barred from the industry. (*Id.* at 69:3-9.)

FINRA also oversees the Company's use of Form U-5 which is a document Schwab must fill out when terminating a registered employee's employment. (*Id.* at 69:11-14; R. Ex. 10.) Like Form U-4, Form U-5 contains several sections to elicit information about an employee's dishonesty, misrepresentations, or misleading conduct. (Tr. at 71:4-72:13.) For example, Question 7B asks the Company to state whether the employee is being terminated for fraud, wrongful taking of property, or violating investment related statutes, regulations, rules, or industry standards of conduct. (*Id.* at 72:4-8; R. Ex. 10, Form U-5, Question 7-B.) The breadth of Question 7B is sweeping and includes all conduct that could be included under FINRA's Rule 2010. (Tr. at 72:10-13.) Schwab is required to report acts of dishonesty, misrepresentation, and misleading conduct on Form U-5. (*Id.* at 73:15-74:18.) FINRA does not differentiate between these three terms; they are all considered some version of false statements or lies. (*Id.* at 77:2-21.)³ As an example of conduct prohibited under this umbrella of deceit, if someone failed to disclose their outside business activity, it may result in termination of employment and the Company filing a Form U-5. (*Id.*)

If Schwab fails to have policies and procedures in place to ensure the aforementioned forms are accurately and appropriately maintained, FINRA can revoke the Company's registration and bar its participation in the securities industry. (*Id.* at 78:15-23.)

C. Schwab's Employees Understand the Regulations and Reasons for its Dishonesty, Misrepresentation, and Misleading Conduct Provision.

Schwab maintains its provision prohibiting dishonesty, misrepresentations, and misleading conduct primarily because it is required to do so by federal and state agencies that

³ None of the agencies, including FINRA, would consider a limited restriction on "maliciously false" statements as compliant with their regulations. (*Id.* 28:25-29:3, 83:1-4.)

regulate the banking and securities industries. (Tr. at 80:7-20.) In addition, Schwab and its employees understand the Company is in a position of trust, “dealing with people’s money, with consumer’s money.” (*Id.* at 28:2-4, 80:9-20.) Consumers entrust their deposits and investments to Schwab. (*Id.* at 28:4-8.) Accordingly, the Company holds itself, and its employees, to a high standard of conduct in interacting with its clients and “seek[s] to do business in a fair and ethical manner.” (*Id.* at 28:4-8, 80:18-20.) Because of the nature of the industries in which Schwab operates, the Company’s employees understand the reasoning behind its prohibition against dishonesty, misrepresentations, and misleading conduct. (*Id.* at 30:23-31:1, 54:9-13.)

III. ARGUMENT

Schwab’s policy provisions at issue in this case do not violate the Act. Its provision prohibiting “acts of disrespect or unprofessional or rude conduct, including making disparaging comments to or about co-workers or clients,” must be read in the context of Schwab’s legitimate business purpose of providing positive and professional service to its clients. No reasonable Schwab employee would construe such a provision to interfere with his or her protected rights under Section 7.

Schwab’s provision prohibiting dishonesty, misrepresentations, and misleading conduct is required of Schwab under the many regulations and laws governing Schwab and the banking and securities industries. Schwab’s employees understand the industries’ obligations to deal honestly without engaging in misrepresentations or misleading conduct. The Board has found policies promulgated in an effort to comply with similar regulatory requirements to NOT violate the NLRA. The Board acknowledged that it was crucial to consider Congressional intent behind securities laws and regulations, which affect millions of consumers, when considering a policy challenged under the Act.

Given the context of each of the challenged provisions in Schwab's Business Conduct Policy in this case, neither provision would lead a reasonable employee to believe the provision interfered with his or her protected rights under Section 7 and any possible, hypothetical restriction is necessitated by compliance with federal and state law.

A. Standard.

A work rule violates Section 8(a)(1) of the Act if the rule "reasonably tends to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The initial assessment of the challenged rule is whether the rule explicitly restricts activities protected by Section 7. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). If there is no explicit restriction of protected activity, a violation can be found with the showing of one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* In applying the *Lutheran Heritage* analysis generally, the Board must give the rule a reasonable reading, avoid reading particular phrases in isolation, and may not presume improper interference with employee rights. *Id.* at 646.

The Company does not maintain any rule that explicitly restricts activities protected by Section 7. The General Counsel contends the following provisions of the Company's Business Conduct Policy would lead employees to reasonably believe they cannot exercise their Section 7 rights:

- Acts of disrespect or unprofessional or rude conduct, including making disparaging comments to or about co-workers or clients.
- Acts of dishonesty, misrepresentation, or other misleading conduct.

Because there are no allegations in this case that these rules were promulgated in response to union activity or that the rules have been applied to restrict the exercise of Section 7 rights, the only remaining *Lutheran Heritage* factor at issue is whether Schwab's employees would reasonably construe the language to prohibit Section 7 activity.

B. Employees Would Not Reasonably Construe Schwab's "Rude and Unprofessional Conduct" Provision to Prohibit Section 7 Activity.

Employers' work rules prohibiting rude and unprofessional conduct toward co-workers and clients have been consistently upheld as not violating Section 8(a)(1). Schwab's rule is similar to rules upheld in other cases and similar to rules described as valid in the General Counsel's Memorandum GC 15-04, Subject: "Report of the General Counsel Concerning Employer Rules" (March 18, 2015). The General Counsel's Memorandum highlights a variety of policies that do and do not violate the Act. Specifically, General Counsel stated, "when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe such a rule prohibits Section 7-protected criticism of the company." GC Memo 15-04, page 8 (emphasis added). Schwab's rude and unprofessional conduct provision falls squarely within the kinds of policies recommended by General Counsel.

In its Memorandum, General Counsel gives the following examples of rules governing employees' interactions with customers that do not violate the Act:

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."

General Counsel's Memorandum GC 15-04. Similarly, rules requiring employees to cooperate with each other in the performance of their work do not implicate Section 7 rights. *See Copper*

River of Boiling Springs, LLC, 360 NLRB 459 (2014). In *Copper*, the Board declined to conclude “that a reasonable employee would read [a] rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way.” *Id.* at 471 (emphasis in original). The rule at issue in *Copper* was similar to Schwab’s provision because it prohibited “lack of respect” and required “cooperation with fellow employees or guests.” *Id.* at 469. The Board held the rule’s reference to a negative impact on other staff and on guests should be read in context of an intention to protect the company’s legitimate business interests. *Id.* The Board recently cited *Copper* indicating the rule was “non-violative . . . because it included effects upon guests.” *Cordua Rests., Inc.*, No. 16-CA-160901, 2016 WL 7190991 (Dec. 9, 2016) (citing *Copper*, 360 NLRB at 459). The Schwab provision is consistent with the direction of the General Counsel and the principles set forth in *Copper* because it specifically focuses on non-supervisory employees and clients.

In *Nat’l Dance Inst. – New Mexico, Inc.*, the Board adopted the ALJ’s finding in which he found the employer’s rule prohibiting “disrespectful” conduct did not violate the Act. 364 NLRB No. 35 (2016). The ALJ held:

A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer’s right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity.

Id. at 12 (emphasis in original).

Similarly, in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), the company’s policy required employees to “maintain[,] in management’s sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors.” *Id.* at 294. The Board

concluded that “an employer in a service industry may require that employees maintain a satisfactory attitude.” *Id.* Schwab operates in a service industry⁴ and requires its employees to avoid unprofessional, disrespectful, and rude conduct to co-workers and clients. Again, noticeably absent from Schwab’s rule is any prohibition against disrespectful, unprofessional, or rude conduct toward or about the Company or employees’ supervisors.

The Company’s rude and unprofessional conduct provision does not refer to the Company or management but rather only refers to comments “to or about co-workers or clients.” As stated by General Counsel, employers can have a “legitimate expectation that employees work together in an atmosphere of civility, and that it is not prohibiting Section 7 activity.” *Id.* at page 9; *see also Lutheran Heritage*, 343 NLRB at 648 (acknowledging an employer’s right to ensure a “civil and decent” workplace.) When read in proper context, Schwab employees would not reasonably construe Schwab’s rude and unprofessional conduct provision to prohibit Section 7 activity. In fact, Schwab employees would know, under specific circumstances, FINRA rules regulate an employee’s rude behavior directed towards customers. *See* FINRA Regulatory Notice 14-20, p. 3 (revising customer complaint investigation codes to include “Poor Service – Where the customer alleges that service from the firm or any of its employees was inadequate and/or unsatisfactory (*e.g.* failure to return phone calls, rudeness, lack of administrative attention to the account, etc.)” (emphasis added). Schwab employees understand the scope of the FINRA regulations and its varied applications. No Schwab employee would reasonably consider the provision to chill protected, concerted activity.

As the D.C. Circuit held in *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, “America’s working men and women are as capable of discussing labor matters in intelligent and

⁴ Schwab provides a multitude of financial services to its clients and interacts with them in-person at its many branches or via the telephone or electronically.

generally acceptable language as those lawyers and government employees who . . . condescend to them.” 253 F.3d 19, 26 (D.C. Cir. 2001). To hold otherwise, reveals a “low opinion of the working people.” *Id.* As the court described, “it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to” disrespectful, rude, or unprofessional language. *Id.* at 26. Arguing that such a prohibition would be interpreted to encompass concerted activity “is implausible.” *Community Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003). Schwab employees would not reasonably construe the rude and unprofessional conduct provision within the Business Conduct Policy to restrict Section 7 activities. The Charge related to this provision must be dismissed.

C. Employees Would Not Reasonably Construe Schwab’s Dishonesty, Misrepresentation, and Misleading Conduct Provision to Prohibit Section 7 Activity.

Schwab includes its provision prohibiting dishonesty, misrepresentation, and misleading conduct in its Business Conduct Policy because it is required to prohibit such conduct by the many federal and state regulating agencies overseeing and regulating the Company’s operations. Schwab is in a special position of trust, handling clients’ deposits and investments—which requires an extra layer of oversight to ensure it conducts its business in a fair and ethical manner. Schwab’s employees understand the highly regulated nature of Schwab’s business, and thus, understand the purpose of Schwab’s rule prohibiting dishonesty, misrepresentation, and misleading conduct.

Employer policies should not be read in a vacuum and are to be applied in context. *See generally* General Counsel’s Memorandum GC 15-04, *supra*; *see also Lutheran Heritage*, 343 NLRB at 646 (noting the Board must “refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.”). The Supreme Court has warned the Board to refrain “from effectuat[ing] the policies of the Labor Relations Act so

single-mindedly that it may wholly ignore other and equally important Congressional objections.” *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). To understand the reasoning behind Schwab’s rule prohibiting dishonesty, misrepresentation, and misleading conduct, and thus understand the context in which Schwab’s employees reason the rule, it is pivotal to understand the regulatory environment governing Schwab and its employees’ conduct.

1. Schwab’s Banking Affiliate Is Heavily Regulated and Required to Prohibit Employees’ Dishonesty, Misrepresentations, and Misleading Conduct.

The banking portion of Schwab is regulated by several agencies, including the CFPB and the OCC. Under the Truth in Lending Act, the CFPB requires Schwab to assess the character of any applicant or current employee, including any acts of personal dishonesty. R. Ex. 1; 12 C.F.R. § 1026.36(f)(3)(iii)(B) (Schwab must determine whether the employee “[h]as demonstrated financial responsibility, character, and general fitness such as to warrant a determination that the individual loan originator will operate honesty, fairly, and efficiently.”). This assessment includes determining whether the employee has committed personal acts of dishonesty.

The OCC requires Schwab to include a termination for cause provision in any employment agreement with its employees that must include a provision permitting termination for cause based on the “employee’s personal dishonesty.” R. Ex. 3; 12 C.F.R. § 163.39 (b)(1). Schwab is also prohibited from hiring or retaining any individual convicted of a crime “involving dishonesty,” which is broadly defined as “directly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or to wrongfully take property belonging to another in violation of any criminal statute.” R. Ex. 2; 12 C.F.R. § 238.84(b)(1). The regulation further defines “dishonesty” as including “acts involving a want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently. . . .” *Id.* Federal statute 12 U.S.C.

§ 1829 similarly prohibits participation in a bank by an individual who has been convicted of a crime of dishonesty. *See* R. Ex. 6.

Under 18 U.S.C. § 1005, any employee of a bank who “makes any false entry in any book, report, or statement” of the bank “[s]hall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.” *See* R. Ex. 4. Similarly, under 12 U.S.C. § 1467(a), agencies regulating Schwab and its employees’ actions have the authority to take several actions against Schwab and its employees. *See* R. Ex. 5. For example, Schwab’s regulating agencies can pursue an injunction against Schwab and its employees, issue a cease and desist letter, assess criminal and civil penalties, including assessing \$25,000 for each during which any violation continues. *Id.* Further, whoever, with the intent to deceive, “violates any provision” of Section 1467(a) “shall be fined not more than \$1,000,000 per day for each during which the violation continues” or be imprisoned not more than five years, or both. *Id.* (Emphasis added). Regulatory penalties are real and can have significant impact on an individual and an organization.

Under 12 U.S.C. § 1818, the FDIC “may initiate informal or formal action when an insured depository institution is found to be in an unsatisfactory condition.” FDIC Compliance Manual (June 2009), 2015 WL 6344113. Specifically, under 12 U.S.C. § 1818(a), if the FDIC Board finds an institution is unsafe and unsound or is engaging in unsafe or unsound practices, or has violated any law, order, or agreement, the FDIC may issue an Order terminating the institution’s insured status, essentially eliminating an employer’s ability to provide banking services. R. Ex. 7.

As a recent example of a penalty levied against a bank, in Federal Reserve Bank Action No. 11-094, Wells Fargo was required to pay an \$85 million civil money penalty stemming from allegations of employees “steering” borrowers into subprime loans and falsifying mortgage

applications. Thus, the bank was severely penalized based on its employees' dishonesty, misrepresentation, and misleading conduct.

Without proper oversight and policy, Schwab exposes itself, its employees, its clients and the general public to significant risk and harm.

2. Schwab's Securities Affiliate Is Heavily Regulated and Required to Prohibit Employees' Dishonesty, Misrepresentations, and Misleading Conduct.

The securities portion of Schwab is also highly regulated, including oversight by the SEC and FINRA.⁵ FINRA enforces its simple, yet powerful, Rule 2010, requiring Schwab to "observe high standards of commercial honor and just and equitable principles of trade." R. Ex. 8. FINRA consistently brings enforcement actions against its members in the securities industry, and their employees, under Rule 2010 based on employees' dishonesty, misrepresentations or misleading conduct.

In *Dep't of Enforcement v. Gadelkareem*, Complaint No. 2014040968501 (Mar. 23, 2017), FINRA affirmed Mr. Gadelkareem's disbarment from associating with a FINRA member in any capacity. In explaining the scope of Rule 2010, FINRA explains, "FINRA Rule 2010 is a broad ethical rule which requires members and associated persons to conduct their business in accordance with 'high standards of commercial honor and just and equitable principles of trade.' FINRA Rule 2010 encompasses all unethical, business-related conduct, even if that conduct is not in connection with a securities transaction." *Id.* at p. 5. *See also*, FINRA Case #2015046919201, Deborah Kelley (CRD # 1179082) March 28, 2017 (barring employee from association with any FINRA member in any capacity because, in part, she misrepresented the

⁵ "Congress and the SEC rely in large part on the securities exchanges themselves, known as 'self-regulatory organizations' ('SROs'), to enforce the Act's requirements . . . Indeed, Congress has vested the Financial Industry Regulatory Authority (FINRA, NASD)) and the New York Stock Exchange (NYSE) with the power to promulgate rules that, once adopted by the SEC, have the force of law. 15 U.S.C. § 78s(b)." *McDaniel v. Wells Fargo Invs., LLC.*, 717 F.3d 668, 673 (9th Cir. 2013) (internal citations omitted).

nature of the expenses she submitted for reimbursement); FINRA Case #2016048923201, Jarred M. Lawson (CRD No. 6093454) March 27, 2017 (suspending employee from association with any FINRA member in any capacity for misrepresentations, including misstatements he made in his firm's internal system regarding what was discussed during his telephone calls with customers). FINRA also brings enforcement actions against individuals for conduct outside of the scope of employment. For instance, FINRA pursued enforcement against individuals in the securities industry for cheating a casino. (Tr. at 62:3-14.)

FINRA also oversees Schwab's use of Forms U-4 and U-5. R. Exs. 9 and 10. Form U-4 is an application for registration in the securities industry that Schwab applicants and employees must fill out. The form requires the applicant to disclose instances of dishonesty requiring, for instance, an applicant to state whether the SEC has "ever found [the applicant] to have made a false statement or omission." (R. Ex. 9; Form U-4, Question 14-C.) Further, the form also requires applicants to respond to the inquiry, "Has any other federal regulatory agency or any state regulatory agency . . . ever found you to have made a false statement or omission or been dishonest, unfair, or unethical?" (R. Ex. 9; Form U-4, Question 14-D.) In addition, the form requires applicants to disclose whether any self-regulatory organization ever found him or her "to have made a false estimate or omission." (R. Ex. 9; Form U-4, Question 14-E.) Schwab must continue to update this form through its employees' employment. FINRA investigates all disclosures of dishonesty and misrepresentations, and depending on the circumstances, such a disclosure could result in the individual being barred from the industry.

FINRA Form U-5 is a document Schwab must fill out when terminating an employee's employment. R. Ex. 10. Like Form U-4, Form U-5 contains several sections to elicit information about an employee's dishonesty, misrepresentations, or misleading conduct. For

example, Question 7B asks the Company to state whether the employee is being terminated for fraud, wrongful taking of property, or violating investment related statutes, regulations, rules, or industry standards of conduct. (R. Ex. 10; Form U-5, Question 7-B.) The breadth of Question 7B is sweeping and includes all conduct that could be included under FINRA's just and equitable principles requirements under Rule 2010. (Tr. at 72:10-13.)

There are no qualifiers limiting the nature of the dishonesty, misrepresentation or misleading conduct; all forms of false statements and acts must be disclosed. If Schwab fails to have policies and procedures in place to make sure the aforementioned forms are accurately and appropriately maintained, FINRA can bar the Company's participation in the securities industry.

3. Schwab's Employees Understand the Heavily Regulated Environment in which They Work.

Schwab operates in highly regulated industries. As the Board has consistently held, employer policies must be read in context. *See generally* General Counsel's Memorandum GC 15-04, *supra*; see also *Lutheran Heritage*, 343 NLRB at 646 (noting the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights"). Schwab's provision prohibiting dishonesty, misrepresentations, and misleading conduct are in place because several federal and state entities require Schwab to have such a provision. Both Jill Richards, Chief Compliance Officer, and Michael Marsh, VP of Compliance, testified that employees generally know and understand that the nature of the work and the regulations governing their work requires them to be honest in all their dealings, refraining from misrepresentations and misleading conduct. Due to the consistent scrutiny Schwab and its employees face, Schwab's employees know and understand that banks and securities firms must enforce policies to prohibit dishonesty, misrepresentations, and misleading

conduct. Indeed, Schwab employees witness regular audits by federal regulators, including interacting with several full-time on-site auditors.

Not only do these employees understand they must be honest within the scope of their work and otherwise, but—in a variety of contexts—Schwab employees are required to affirmatively respond to inquiries related to their honesty. For example, the Form U-4 contains several questions for securities employees to answer regarding whether they have been dishonest, misleading or made misrepresentations. Given the context within which Schwab employees work, they would not reasonably construe Schwab’s rule prohibiting dishonesty, misrepresentations, and misleading conduct to prohibit Section 7 Activity.

As the D.C. Circuit held, the Board should, when evaluating the context of Schwab’s operations and governing regulations, give the workforce credit regarding their ability to understand the context and reasoning of Schwab’s work rules. *Adtranz*, 253 F.3d at 26. To hold otherwise, reveals a “low opinion of the working people” at Schwab. *Id.* Finding that Schwab’s prohibition against dishonesty, misrepresentations, and misleading conduct could reasonably be interpreted to encompass concerted activity, especially given the nature of Schwab’s operations, would be “implausible.” *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003).

4. Policies Promulgated to Comply With Banking and Securities Laws and Regulations Do Not Violate the NLRA.

The Board in *Dresser-Rand Co. & Local 313, IUE-CWA, AFL-CIO*, affirmed the ALJ’s holding that a publicly traded employer’s rules related to insider trading and fair disclosure did not violate the Act, in part, because the rules were required due to the regulation of the securities market. 358 NLRB 254 (2012). In *Dresser-Rand*, the company’s policies were enacted to comply with federal and state laws and regulations applicable to the purchase and sale of the

company's securities. *Id.* The ALJ held, "[b]ecause the policies ha[d] very significant implications relating to the Federal securities laws and regulations, [he was required to] consider the Board's standards for resolution of potential conflicts between the Act and other Federal legislation." *Id.* at 280. The *Dresser-Rand* decision included an analysis under *Lutheran Heritage*. The ALJ determined, as in *Lutheran Heritage*, it was vital to analyze the rule in the context of its intended purpose. *Id.* Because the purpose of *Dresser-Rand* rules had "nothing whatsoever to do with union activity," the ALJ determined reasonable employees would not conclude the company's two policies would preclude protected concerted activity. *Id.* The ALJ also held that the "legal aspects of the regulation of the securities markets [were] of particular importance." *Id.* at 282.

Understanding that one of the basic goals of the NLRA is the establishment of industrial peace, it would be antithetical to that purpose to create a system in which compliance with one agency's requirements resulted in an inability to comply with another. The Board acknowledged the January 18, 2011 Presidential Executive Order "Improving Regulation and Regulatory Review" directing "each agency shall attempt to promote such coordination, simplification, and harmonization" between the regulatory requirements imposed upon various industries. *Id.* at 282, fn. 57. The *Dresser-Rand* ALJ noted the interests of the "millions of citizens who invest in publicly-traded stocks and the national interests in the . . . fairness of the markets that deal in those stocks." *Id.* The ALJ was concerned about the potential rescission of the company's policies and the consequential effect on the fair and transparent operation of the nation's securities exchanges. *Id.* Thus, he quoted the company's expert witness stating, "the damage to the company *shareholders* from any misleading information—reckless, careless, or innocent—is severe." *Id.* at 283 (emphasis in original). The Board adopted the finding that policies "designed

to protect the employer from liability under the securities laws and regulations” and not intended to be “construed as restricting discussion or disclosure of employees’ own terms and conditions of employment” did not violate the NLRA. *Id.* at 284. The Schwab provision has the same fundamental purpose as those considered in *Dresser-Rand*.

As in *Dresser-Rand*, Schwab’s work rule prohibiting dishonesty, misrepresentations, and misleading conduct is designed to protect Schwab from liability under the securities laws and regulations—some of which are described above—and not intended to restrict protected discussion under Section 7. As in *Dresser-Rand*, any conflict between the Act and Schwab’s policies is “merely apparent, not real.” *Id.* (citing *Lutheran Heritage*, 343 NLRB at 646-47) (work rules must be given a “reasonable reading” that does not “presume improper interference with employee rights.”).

In addition, the OCC specifically sets an expectation that covered entities will “Establish an Appropriate Corporate Culture”. See Office of the Comptroller of the Currency, Comptroller’s Handbook, Safety and Soundness, Corporate and Risk Governance, page 13 (July 2016) (the “OCC Handbook”). The OCC Handbook instructs that a Code of Ethics include governance of “Fair Dealing: Employees, officers, and directors should not conceal information, abuse privileged information, misrepresent material facts, or engage in any other unfair dealing practice.” *Id.* at p. 14. It goes on to instruct that directors may be criminally liable for “false statements generally”. *Id.* at 15-16 citing 18 U.S.C. § 1001. The OCC is clear regarding its expectations of its regulated entities; Schwab’s policies are drafted with the specific intent of achieving compliance with those instructions.

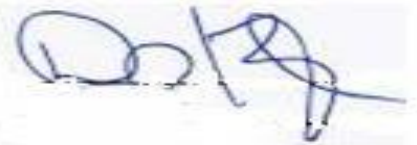
Thus, given the context of the unique industries in which the Company operates, employees would not reasonably construe Schwab’s provision prohibiting dishonesty,

misrepresentations and misleading conduct to restrict Section 7 activities and, even if they may have a hypothetical impact on potentially protected activity, they are necessary for compliance with the banking and securities regulations and, therefore, lawful.

IV. CONCLUSION

In light of the facts and authority cited above, Schwab requests that the Board find in its favor and dismiss the Charge in its entirety.

Dated this 13th day of June, 2017

A handwritten signature in blue ink, appearing to read 'D. Zwisler', is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2017, a true and correct copy of the foregoing **CHARLES SCHWAB & CO., INC.'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** was electronically filed through the National Labor Relations Board's website and a copy was served via Certified & U.S. Mail, postage prepaid, on the following:

The Honorable Judge Jeffrey Wedekind
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